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Larry E. Craig, Chairman
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No. 91

Legislative Notice

Editor, Judy Gorman Prinkey

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S. 1645 — Child Custody Protection Act

Calendar No. 472

Reported July 16, 1998, by the Senate Committee on the Judiciary, with an amendment in the nature of a substitute, by a vote of 10-6 (Senators Leahy, Kennedy, Feinstein, Feingold, Durbin, and Torricelli voting nay). S. Rept. 105-268, minority views filed.

NOTEWORTHY

- The Senate may begin consideration of S. 1645 on Wednesday, September 9, 1998. The Majority Leader expects to file cloture on the motion to proceed, with a cloture vote likely occurring on Friday, September 11.
- S. 1645 prohibits the knowing transportation of a minor across a state line with the intent that she obtain an abortion, in circumvention of a states's parental consent or parental notification law.
- An identical measure, H.R. 3682, passed the House on July 15, 1998, by a vote of 276-150. President Clinton has indicated he will veto S. 1645/H.R. 3682 if passed.
- The bill provides for punishment of violations by a maximum of one year in prison, a fine, or both. It would also allow a parent who has been injured by a violation to seek relief through a civil action. Neither the minor nor her parents can be prosecuted or sued under S. 1645.
- The purpose of S. 1645 is to help prevent circumvention of duly enacted state laws that seek to promote parental involvement in a minor daughter's decision with respect to abortion. Such laws, which the Supreme Court has upheld, are designed to protect parental rights and the health and safety of minors. However, they are sometimes circumvented by third parties who, without the parents' knowledge or consent, take minor girls across state lines into jurisdictions where parental involvement is not required.
- S. 1645 does not supersede, override, or in any other way alter existing state laws regarding minor's abortions. Nor would the bill impose any federal parental notice or consent requirement. Rather, it merely provides assistance to states that have chosen to adopt such requirements from efforts to circumvent them.

BACKGROUND

At least 22 states have laws requiring parental notification or consent before a minor can obtain an abortion. These laws, the constitutional validity of which has been upheld by the federal courts, enjoy widespread public support as reflected in polls. Such laws protect parental custody rights over their minor children; parents are generally presumed in law and custom as the best source of guidance for their minor children on their most important decisions. Also, abortion entails a degree of medical risk that may require special precautions with regard, for example, to allergic reactions to certain kinds of anesthetics or immune deficiencies; a stranger is not likely to have knowledge of these concerns and ensure that precautions are taken. Like other surgical procedures, abortion can pose risks of postoperative complications (for example, perforated uterus, which is considered a "normal risk" of the procedure [see the Committee Report, page 4]), and parental involvement increases the probability that prompt medical attention will be sought for any complications.

The Committee heard testimony from two mothers whose daughters were secretly taken for abortions without their parents' knowledge, with potentially devastating consequences. In both cases, the minors on whom the abortions were performed suffered serious medical consequences. In one case (see the Committee Report, page 5) a 13-year-old rape victim was taken out of state by the rapist's mother in order to destroy evidence of the rape (i.e., the resulting pregnancy). One significant reason behind evasion of states' parental consent or notification laws is believed to be an effort to cover up statutory rape violations where illicit relations by an adult man with an underage girl results in pregnancy.

States with parental consent laws are becoming increasingly aware that their laws are being circumvented. Many abortion clinics in nearby states encourage the evasion of these laws by advertising their "no parental consent" status in states where such laws exist. For example, the 1996 Yellow Pages for Scranton, Pennsylvania (the Commonwealth passed a parental consent law in 1994), displayed an ad for an abortion clinic in Englewood, New Jersey (which has no such law), proclaiming "No Parental Consent Required."

The Committee Report includes a lengthy analysis of the constitutional issues involved in the legislation, including questions regarding Congress's power to regulate interstate commerce and the status of parental consent and notification laws under the convoluted web of jurisprudence beginning with the 1973 *Roe v. Wade* decision. S. 1645 builds upon two of the few points of agreement in the national debate over abortion: the desirability of parental involvement in a minor's abortion decision, and the need to protect a pregnant minor's physical health. The bill would not establish a national requirement of parental consent or notification prior to the performance of an abortion on a minor under 18. Nor does it attempt to regulate any purely intrastate activities related to the procurement of abortion services. S. 1645 simply helps effectuate the policies of states that have decided to provide a layer of protection for their own residents against these dangers to children's health and safety by requiring parental involvement in the abortion decision.

BILL PROVISIONS

Sec. 1. Short Title

Sec. 2. Transportation of Minors to Avoid Certain Laws Relating to Abortion.

Section 2(a) amends title 18 of the United States Code by inserting after chapter 117 a proposed new chapter 117A entitled "Transportation of minors to avoid certain laws relating to abortion," within which would be included a new section 2401 on this subject.

Subsection (a) of proposed section 2401 outlaws the knowing transportation across a state line of a person under 18 years of age with the intent that she obtain an abortion, in abridgment of a parent's right of involvement according to state law. This subsection requires only knowledge by the defendant that he or she was transporting the person across state lines with the intent that the minor obtain an abortion. It does not require that the transporter know the requirements of the home state law, know that they have not been complied with, or indeed know anything about the existence of the state law. By the same token, it does not require that the defendant know that his or her actions violate federal law, or indeed know anything about the federal law. A reasonable belief that parental notice or consent, or judicial authorization, has been given, is an affirmative defense whose terms are set out in subsection (c).

Subsection (a), paragraph (1), imposes a maximum of 1 year imprisonment or a fine, or both. Subsection (a), paragraph (2) specifies the criteria for a violation of the parental right under this statute as follows: an abortion must be performed on a minor in a state other than the minor's residence and without the parental consent or notification, or the judicial authorization, that would have been required had the abortion been performed in the minor's state of residence.

Subsection (b), paragraph (1) specifies that subsection (a) does not apply if the abortion is necessary to save the life of the minor. This subsection is not intended to preempt any other exceptions that a state parental involvement law that meets the definitions set out in subsection (e)(1) and (e)(2) may recognize.

Subsection (b), paragraph (2) clarifies that neither the minor being transported nor her parents may be prosecuted or sued for a violation of this bill.

Subsection (c) provides an affirmative defense to prosecution or civil action based on violation of the act where the defendant reasonably believed, based on information obtained directly from the girl's parent or other compelling facts, that the requirements of the girl's state of residence regarding parental involvement or judicial authorization in abortions had been satisfied. A minor's own assertion to a defendant that her parents knew or had consented would not, by itself, constitute sufficient basis to make out this affirmative defense.

Subsection (d) establishes a civil cause of action for a parent who suffers legal harm from a violation of subsection (a).

Subsection (e) sets forth definitions of certain terms in this bill. Subsection (e)(1)(A) defines "a law requiring parental involvement in a minor's abortion decision" to be a law requiring either "the notification to, or consent of, a parent of that minor or proceedings in a State court." Subsection (e)(1)(B) stipulates that a law conforming to the definition in (e)(1)(A) cannot

provide notification to or consent of any person or entity other than a "parent" as defined in the subsequent section.

Subsection (e)(2) defines "parent" to mean a parent or guardian, or a legal custodian, or a person standing in loco parentis (if that person has "care and control" of the minor and is a person with whom the minor "regularly resides") and who is designated by the applicable state parental involvement law as the person to whom notification, or from whom consent, is required. In this context, a person in loco parentis has the meaning it has at common law: a person who effectively functions as a child's guardian, but without the legal formalities of guardianship having been met. It would *not* include individuals who are not truly exercising the responsibilities of parents, such as an adult boyfriend with whom the minor may be living.

Subsection (e)(3) defines "minor" to mean a person not older than the maximum age requiring parental notification or consent, or proceedings in a state court, under the parental involvement law of the state, where the minor resides. Subsection (e)(4) defines "state" to include the District of Columbia "and any commonwealth, possession, or other territory of the United States."

Section 2(b) is a clerical amendment to insert the new chapter in the table of chapters for part I of title 18.

ADMINISTRATION POSITION

At press time, the Administration had not sent a formal Statement of Administration Policy on S. 1645. However, on July 14, 1998, the Administration released a statement on the identical House bill, H.R. 3682, indicating the President would veto the bill if presented to him. The statement says the Administration would accept the bill only if it were amended to:

- "Exclude close family members from criminal and civil liability. Under the legislation, grandmothers, aunts, and minor and adult siblings could face criminal prosecution for coming to the aid of a relative in distress."
- "Ensure that persons who only provide information, counseling, referral, or medical services to the minor cannot be subject to liability."
- "Address constitutional and other legal infirmities that the Department of Justice has identified in particular provisions of the legislation" as provided to the House Judiciary Committee in June 1998.

COST

The Congressional Budget Office (CBO) estimates that implementing S. 1645 would not result in any significant cost to the federal government. The preliminary scoring estimate of the Office of Management and Budget (OMB) is zero.

OTHER VIEWS

Minority Views of Senators Leahy, Kennedy, Feinstein, Feingold, Durbin, and Torricelli. Included in the Committee Report are extensive Minority Views of the six Senators who voted against S. 1645 in Committee. The following are excerpts of the summary introduction to their remarks:

> Proponents of the so-called Child Custody Protection Act argue that this bill would help "protect familial relations and safeguard children from health and safety risks." They are wrong. Far from promoting healthy family relationships, this bill would drive young women away from their families and greatly increase the dangers they face from an unwanted pregnancy. Moreover, this bill would undermine important federalism principles and violate the Constitution on multiple grounds. Finally, the bill poses significant enforcement problems that the sponsors fail to acknowledge, let alone address in any substantive fashion.
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> While proponents indicate in the majority report that the bill's "simple purpose" is to provide "assistance to states that have elected to adopt such requirements," only the most restrictive state parental consent or notification laws would garner such assistance. The bill carefully restricts the parental involvement laws that would enjoy the new federal "assistance" offered by the bill to those that require the consent of or notification to only parents or guardians of a pregnant minor. States that have chosen not to enact any parental involvement law or with such a law that allows for the involvement of any other family member, such as a grandparent, aunt or adult sibling, in the decision of a minor to obtain an abortion, are not entitled to any Federal "assistance." In short, this bill rejects sound federalism principles in favor of the parental involvement laws adopted and enforced in only 20 States.
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> The consequence of such a law should be obvious: instead of increasing parental involvement in a minor's decision to terminate a pregnancy, S. 1645 would dramatically increase the isolation of young pregnant women and the dangers they face in obtaining an abortion. This bill would merely lead to more young women traveling alone to obtain abortions or seeking illegal "back alley" abortions locally, hardly a desirable policy result.
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> In addition to close family members, any other person to whom a young pregnant woman may turn for help, including her minor friends, health care

providers, and counselors, could be dragged into court on criminal charges or in a civil suit. The criminal law's broad definitions of conspiracy, aiding and abetting, and accomplice liability, in conjunction with the bill's strict liability, could have the result of indiscriminately sweeping within the bill's criminal prohibition a number of unsuspecting persons having only peripheral involvement in a minor's abortion.

Finally, because the bill imposes significant new burdens on a woman's right to choose and impinges on the right to travel and the privileges and immunities due under the Constitution to every citizen, it has been declared unconstitutional by constitutional scholars.

POSSIBLE AMENDMENTS

Two amendments defeated in Committee are likely to be offered on the floor:

Kennedy. To require the Attorney General to certify as a precondition of federal prosecution that (a) the appropriate state court did not have jurisdiction or refused to assume jurisdiction with respect to the conduct sought to be prosecuted, and (b) federal prosecution was necessary and in the public interest.

Feinstein. To exempt any adult family member of the minor from the prohibitions in the bill.

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